

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY JUNIOR WEBSTER,  
Petitioner,

v.

S.W. ORNOSKI, Acting Warden  
of the California State  
Prison at San Quentin,

Respondent.

No. CIV.S-93-0306 LKK DAD DP

ORDER RE RESPONDENT'S  
MOTION FOR DISCOVERY

DEATH PENALTY CASE

This capital habeas action came before the court on May 11, 2007, for hearing on respondent's motion for leave to conduct discovery with respect to trial counsel's files. James S. Thomson and Timothy J. Foley appeared on behalf of petitioner. Deputy Attorney General Patrick J. Whalen appeared on behalf of respondent. Having considered all written materials submitted in connection with the motion, and after hearing from the parties, the motion will be granted in part with petitioner's counsel being directed to deliver the requested documents to chambers for *in camera* review.

**THE ARGUMENTS OF THE PARTIES**

Through this motion respondent seeks all files of trial counsel relating to petitioner's capital murder trial that are in the possession of either trial counsel or the Office of the Federal Defender.<sup>1</sup> Respondent seeks such discovery on the grounds that by alleging ineffective assistance of trial counsel with respect to the preparation of the penalty phase of his trial, petitioner has waived the attorney-client privilege as to all communications with his allegedly ineffective trial attorneys. Specifically, respondent argues that it is vital that they be allowed to review trial counsel's files to determine what facts were known to them and what steps they took in preparing for the penalty phase and in order to defend against petitioner's ineffective assistance claim.

Petitioner's counsel represents that they are in possession of all trial counsel's files and, subject to a protective order, are voluntarily making available for respondent's review the vast majority of those files. However, petitioner's counsel has identified approximately 200 pages of the approximately four bankers boxes of trial counsel's files which they believe are not subject to discovery. The disputed categories of documents are those responsive to the following discovery requests by respondent: (1) Materials relating to expert psychiatric and psychological examinations, interviews and testing of petitioner at the time of trial; (2) documents obtained by trial counsel from counsel representing

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<sup>1</sup> In this regard, respondent has requested that subpoenas be issued to both trial counsel requiring them to produce their files.

1 petitioner in connection with his 1974 and 1977 convictions in the  
2 State of Washington for burglary and assault; and (3) documents  
3 relating to California Penal Code § 987.9 funding requests other than  
4 the billings of the trial investigator.

5         Petitioner acknowledges that the attorney-client privilege  
6 may be waived when a habeas petitioner raises a claim of ineffective  
7 assistance of counsel. However, petitioner asserts that the waiver  
8 is limited by, and must be closely tailored to, the scope of the  
9 claims presented. In this regard, petitioner contends that while he  
10 has claimed ineffective assistance of counsel in connection with the  
11 penalty phase of his trial, he has not presented any evidence of  
12 psychiatric diagnosis or mental illness in connection with that  
13 claim. Thus, he concludes, materials relating to expert psychiatric  
14 and psychological examinations and interviews at the time of his  
15 trial are not relevant to his ineffective assistance of counsel claim  
16 and he has not waived the privilege with respect to those materials.<sup>2</sup>  
17 Likewise, petitioner argues that at his trial he did not dispute the  
18 prior convictions and in the petition before this court he has not  
19 claimed that his counsel was ineffective with regard to those prior  
20 convictions. Accordingly, he argues that the records sought are  
21 simply not relevant to his ineffective assistance of counsel claim  
22 and he has not waived the privilege with respect thereto. Finally,  
23 petitioner advances the same argument with respect to the § 987.9

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25         <sup>2</sup> Petitioner also argues that both the work product and  
26 psychotherapist-patient privileges are in place and independently  
protect these documents from disclosure.

1 records other than those relating to the billings of his trial  
2 investigator.

3 In reply, respondent argues that all materials in trial  
4 counsel's files must be disclosed once a claim of ineffective  
5 assistance of trial counsel is presented. Respondent contends that  
6 the waiver of the attorney-client privilege in such circumstances is  
7 unlimited. Respondent claims that this is the case because in order  
8 to inquire into the reasonableness of counsel's action under the  
9 Strickland standard, it is imperative to know everything that counsel  
10 knew at the time as well as exactly what investigation counsel had  
11 conducted and what counsel had learned as a result. Specifically,  
12 respondent contends that knowing the result of psychiatric or  
13 psychological investigation which trial counsel conducted is  
14 extremely relevant to evaluating the reasonableness of the additional  
15 steps counsel did or did not take in preparing for the penalty phase  
16 of petitioner's trial.<sup>3</sup>

#### 17 ANALYSIS

18 The court finds unpersuasive respondent's argument that the  
19 inclusion of an ineffective assistance of counsel claim in a habeas  
20 petition constitutes an unlimited waiver of the attorney-client  
21 privilege. The scope of the implied waiver of the attorney-client

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24 <sup>3</sup> At the hearing on the motion respondent's counsel indicated  
25 that in light of the representations of counsel for petitioner that  
26 they possessed all of trial counsel's files, respondent wished to  
reserve the request that subpoenas be issued to trial counsel  
requiring the production of those files.

1 privilege in this context has been specifically addressed by the  
2 Ninth Circuit Court of Appeals as follows:

3 [T]he doctrine of implied waiver allocates  
4 control of the privilege between the judicial  
5 system and the party holding the privilege."  
6 Privileged Communications, 98 Harv. L.Rev. at  
7 1630. The court imposing the waiver does not  
8 order disclosure of the materials categorically;  
9 rather, the court directs the party holding the  
10 privilege to produce the privileged materials *if*  
11 it wishes to go forward with its claims  
12 implicating them. The court thus gives the  
13 holder of the privilege a choice: If you want to  
14 litigate this claim, then you must waive your  
15 privilege to the extent necessary to give your  
16 opponent a fair opportunity to defend against it.  
17 See, e.g., Amlani, 169 F.3d at 1195 (holding that  
18 courts must evaluate "whether allowing the  
19 privilege would deny the opposing party access to  
20 information vital to its defense" (internal  
21 quotation marks omitted)); Chevron, 974 F.2d at  
22 1162. Essentially, the court is striking a  
23 bargain with the holder of the privilege by  
24 letting him know how much of the privilege he  
25 must waive in order to proceed with his claim.

15 The first is that the court must impose a waiver  
16 no broader than needed to ensure the fairness of  
17 the proceedings before it. Because a waiver is  
18 required so as to be fair to the opposing side,  
19 the rationale only supports a waiver broad enough  
20 to serve that purpose. Courts, including ours,  
21 that have imposed waivers under the fairness  
22 principle have therefore closely tailored the  
23 scope of the waiver to the needs of the opposing  
24 party in litigating the claim in question. See,  
25 e.g., Kerr v. U.S. Dist. Court, 426 U.S. 394,  
26 405, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976)  
(recognizing the need to ensure that the "balance  
between petitioners' claim[ ] of ... privilege  
and plaintiffs' asserted need for the documents  
is correctly struck"); Amlani, 169 F.3d at 1196  
(holding that "only those documents or portions  
of documents relating to the [claim asserted by  
the client] [should be] disclosed"); Greater  
Newburyport Clamshell Alliance v. Pub. Serv. Co.,  
838 F.2d 13, 22 (1st Cir.1988) (holding that the  
client need reveal only 721 information "for  
which defendants have so far shown a true need

1 and without which they may be unfairly prejudiced  
2 in their defense"); see also Mueller &  
3 Kirkpatrick § 5.31, at 553 (suggesting that "in  
4 applying the doctrine of implied waiver by claim  
assertion, courts must be careful to target only"  
those privileged materials without which the  
adverse party would be unfairly prejudiced).

5 Bittaker v. Woodford 331 F.3d 715, 720-21 (9th Cir. 2003) (en banc)  
6 (emphasis added). See also Mason v. Mitchell, 293 F. Supp. 2d 819,  
7 829 (N.D. Ohio 2003) (ineffective assistance of counsel claim limited  
8 to penalty phase and respondent therefore precluded from obtaining  
9 documents from trial counsel's files relating to the guilt phase of  
10 petitioner's trial).

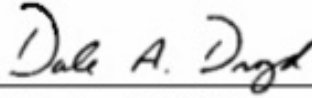
11 In order for this court to closely tailor the scope of the  
12 implied waiver so that only those documents, or portions of  
13 documents, relating to the ineffective assistance of counsel claim  
14 asserted by petitioner are disclosed, the court will conduct an *in*  
15 *camera* review of the approximately 200 pages of documents being  
16 withheld by petitioner's counsel. See United States v. Amlani, 169  
17 F.3d 1189, 1196 (9th Cir. 1999); see also Kerr v. United States Dist.  
18 Court, 426 U.S. 394, 405 (1976) (" in camera review of ... documents  
19 is a relatively costless and eminently worthwhile method to insure  
20 that the balance between petitioners' claims of irrelevance and  
21 privilege and plaintiffs' asserted need for the documents is  
22 correctly struck.")

23 Accordingly, petitioner's counsel shall submit the  
24 documents in question to chambers for in camera review by May 24,  
25 2007. Following the in camera review the court will issue an order  
26 requiring the disclosure of those documents or portions of documents,

1 if any, sought by respondent that are not protected by the asserted  
2 privilege(s).

3 IT IS SO ORDERED.

4 DATED: May 21, 2007.

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6 DALE A. DROZD

7 UNITED STATES MAGISTRATE JUDGE

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